91-200

Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN AND MARTIN ROCHMAN

Petitioners

- v.-

THE STATE OF NEW HAMPSHIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DO COMMON STOCKHOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (PSNH) THAT HAS FILED FOR PROTECTION FROM CREDITORS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE HAVE STANDING TO CHALLENGE A DECISION ISSUED BY THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION APPROVING A RATE AGREEMENT EMBODIED IN A PLAN OF REORGANIZATION ON THE GROUNDS THAT SUCH DECISION VIOLATES RIGHTS OF PSNH AND ITS STOCKHOLDERS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

2. DOES A DECISION ISSUED BY THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION THAT APPROVES A RATE AGREEMENT EMBODIED IN A PLAN OF REORGANIZATION FOR PSNH WITHOUT REGARD TO WHETHER SUCH RATES WILL ENABLE PSNH TO RECOVER ITS PRUDENT INVESTMENT IN USED AND USEFUL PROPERTY CONSTITUTE A TAKING OF THE PROPERTY OF PSNH AND ITS STOCKHOLDERS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

PARTIES BELOW

Petitioners Richards, Kaufman and Rochman, common stockholders of Public Service Company of New Hampshire, were appellants below. The decision of the New Hampshire Public Utilities Commission was also appealed by the Campaign For Ratepayers Rights, an association representing some ratepayers, and by John V. Hilberg, an individual ratepayer. Responding to the appeals were the State of New Hampshire, Northeast Utilities Service Company on behalf of its parent, Northeast Utilities, and Public Service Company of New Hampshire. The Business & Industry Association of New Hampshire and the Office of Consumer Advocate filed a brief as amici curiae.

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OPINIONS BELOW

Petitioners, Robert C. Richards, Edward Kaufman and Martin Rochman (hereinafter referred to as "RKR") ask the Court to review a decision issued by the Supreme Court of New Hampshire on April 24, 1991, in Appeal of Robert C. Richards, Edward Kaufman and Martin Rochman; Appeal of Campaign for Ratepayers Rights and John V. Hilberg, _____N.H.____, ____A.2d____ (1991), dismissing RKR's appeal of Report and Order No. 19,918 issued by the New Hampshire Public Utilities Commission ("PUC") on July 20, 1990, in Re Northeast Utilities/ Public Service Company of New Hampshire, 114 PUR 4th 385 (N.H.P.U.C. 1990).

The opinion of the court below is at Appendix ("App.") A. The court's opinion on rehearing, dated June 5, 1991, is at App. B. Neither opinion is as yet offi-

cially reported.

The PUC's Report and Order No. 19,889, is at App. C. The PUC's Report and Order No.19,918 dated August 17, 1990, denying RKR's request for rehearing is at App. E. Its Report and Order No. 19,917, also of August 17, 1990, denying the request for rehearing of the Campaign for Ratepayers Rights ("CRR") and John V. Hilberg ("Hilberg") is at App.F.

JURISDICTION

This petition is being docketed within 90 days of the opinion on rehearing by the Supreme Court of New Hampshire on June 5, 1991. The Court has jurisdiction under 28 U.S.C. §1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V, clause 3:

"[N]or shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, clause 3:

"[N]or shall any state deprive any person of . . . property, without due process of law; nor deny to any person . . . equal protection of the laws."

N.H. Rev. Stat. Ann. 362-C

"1. Declaration of Purpose and Findings. The legislature finds that:

. . .

IV . . . the public utilities commission should be authorized to determine whether a proposed agreement relating to the reorganization of Public Service Company of New Hampshire and . . . the acquisition of Public Service Company of New Hampshire by Northeast Utilities, would be consistent with the public good and whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved."

"2. Definitions. In this chapter:

I. 'Agreement' means the agreement

dated as of November 22, 1989, as amended through December 14, 1989, executed by and between the governor and attorney general of the state of New Hampshire, on behalf of the state of New Hampshire, and Northeast Utilities Service Company, acting on behalf of its parent Northeast Utilities."

IV. 'NU plan' means the amended plan of reorganization filed in December of 1989, by Northeast Utilities Service company which provides for the resolution of the outstanding creditor claims and equity security interests of Public Service Company of New Hampshire in the Public Service Company of New Hampshire bankruptcy case."

"3. Action by the Commission. The Commission is authorized, after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with the public good. If the Commission so finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates, fares, or charges and the fuel and purchased power adjustment clause to be maintained for Public Service Company of New Hampshire, or its successor, in accordance with the agreement; then the Commission shall initiate such other proceedings, hold such other hearings and take such other actions as may be necessary to implement the provisions of the agreement."

N.H. Rev. Stat. Ann. 378:27

Temporary Rates. In any proceeding involving the rates of a public utility brought either upon motion of the commission or upon complaint, the commission may, after reasonable notice and hearing, if it be of the opinion that the public interest so requires, immediately fix, determine and prescribe for the duration of said proceeding reasonable temporary rates; provided, however, that such temporary rates shall be sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.

N. H. Rev. Stat. Ann. 378:28

Permanent Rates. So far as possible, the provision of RSA 378:27 shall be applied by the commission in fixing and determining permanent rates, as well as temporary rates. Nothing herein contained shall preclude the commission from receiving and considering any evidence which may be pertinent and material to the determination of a just and reasonable rate base and a just and reasonable rate of return thereon.

N. H. Rev Stat. Ann. 378:29

Adjustment. Temporary rates so fixed, determined, and prescribed under this subdivision shall be effective until the final determination of the rate

proceeding, unless terminated sooner by the commission. In every proceeding in which temporary rates are fixed, determined and prescribed under this subdivision, the commission shall consider the effect of such rates in fixing determining and prescribing rates to be thereafter demanded or received by such public utility on final determination of the rate proceeding. If, upon final disposition of the issues involved in such proceeding, the rates as finally determined are in excess of the rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect.

STATEMENT OF THE CASE

On January 28, 1988, Public Service Company of New Hampshire ("PSNH") became the first electric utility since the Depression to file for protection from its creditors under Chapter 11 of the Bankruptcy Code and perhaps the first, ever, to be forced to do so by government regulation rather than economic forces.

Although the State of New Hampshire (the "State") permitted PSNH to finance the construction of its Seabrook Nuclear Generating Station ("Seabrook"), after PSNH had spent a substantial amount of money on the project, the State passed its "anti-CWIP law" (RSA 378:30-a) and prohibited PSNH from recovering a return of, or on, its construction work in progress. The anti-CWIP law increased greatly PSNH's cost of capital. It nevertheless was able to complete construction in 1986, but it could not get an operating

license from the Nuclear Regulatory Commission (the "NRC") because Massachusetts refused to cooperate in developing an emergency evacuation plan.

With PSNH clearly on the brink in 1987, the State then refused to grant relief from its anti-CWIP law and the Supreme Court of New Hampshire held that the law could be applied even under such circumstances. Petition of Public Service Company of New Hampshire, 130 N.H. 265, 539 A.2d 263 (1988). It held that the law merely allocated the risk of failure to the stockholders and was constitutional. It acknowledged at the same time that if the plant were finally successful, the stockholders would be entitled to a return that compensated them for the greater risk and the ratepayers would have to pay more as a consequence. 130 N.H. at 269, 539 A. 2d at 270. Two days later PSNH filed its Chapter 11 petition.

PSNH's subsequent appeal to this Court was dismissed for want of a properly presented federal question. Public Service Company of New Hampshire v. New Hampshire, 488 U.S. 1035 (1989).

It was expected that bankruptcy would merely defer, not discharge, PSNH's obligations to its creditors and would impose additional crushing costs on PSNH and its ratepayers. It did not turn out that way. The State has managed to exploit the processes of the bankruptcy court to avoid not only the expected consequences of its anti-CWIP law but the mandates of this Court with regard to just and reasonable rates.

The Plan and Rate Agreement

On April 20, 1990, the Bankruptcy Court for the District of New Hampshire confirmed (the "Confirmation Order") a plan of reorganization (the "Plan") proposed by Northeast Utilities ("NU") and

by PSNH, the Official Committee of Unsecured Creditors (the "Creditors Committee"), the Official Committee of Equity Security Holders (the "Equity Committee") and certain holders of PSNH's Third Mortgage Bonds.

The Plan is to be implemented in two steps. In the first, which occurred on May 16, 1991, shortly after the court below issued its decision herein, PSNH's outstanding debt and equity securities were exchanged for cash and new debt and common stock of "Reorganized PSNH". In the second, which will occur if the Confirmation Order becomes a final order and certain other approvals are obtained, a wholly owned subsidiary of NU will purchase, for $20 a share, all of the newly issued common stock of Reorganized PSNH.

Embodied in, and at the heart of, the Plan is a rate agreement (the "Agreement") which purports to determine

the rates to be charged in the future by Reorganized PSNH. The Agreement was negotiated by NU on behalf of itself and the Governor and Attorney General on behalf of the State and signed on November 22, 1989. The Agreement was conditioned on its being embodied in the Plan and the first step of the Plan, as required by Section 1129 (a) (6) of the Bankruptcy Code, was conditioned on the Agreement being approved, to the satisfaction of NU, by the PUC.

The Agreement permits Reorganized PSNH to increase its average retail base rates by 5.5% a year for the next seven years. App. C at 153a. The first increase went into effect on January 1, 1990. The second, on May 16, 1991. The subsequent five increases will occur on the anniversaries of May 16, 1991. Thereafter, Reorganized PSNH's rates will be fixed at a level that will enable it

to recover its prudent costs as then reflected on its books.

The Agreement also provides that Reorganized PSNH will hold assets initially that have a book value of approximately $2.3 billion consisting of $800 million of non-Seabrook assets and approximately $1.5 billion of PSNH's $2.9 billion (as January 1, 1990) investment in Seabrook. Seabrook will be booked at $700 million and depreciated on a straight line basis over Seabrook's expected life of 39 years. The remaining $800 million of Seabrook will be booked as an "Acquisition Premium", $425 million of which will be written off very quickly in 7 years and $375 million, in 20 years. As a result of those extraordinary write-offs, NU expects that Reorganized PSNH's rates will be essentially flat or even decline a bit over the three years following the 7 year fixed rate period. At

the end of 10 years, NU expects that Reorganized PSNH's rates will be lower in real terms than they are today, only slightly higher than for the New England Region as a whole, and substantially less than those of United Illuminating, the second largest owner of Seabrook. App. C at 113a.[2]

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[2]By contrast, the Long Island Lighting Company (LILCO), which faced identical licensing problems with its Shoreham Nuclear Generating Station ("Shoreham") but was allowed to stay out of bankruptcy by the New York Public Service Commission (the "NYPSC"), is charging rates now that are more than 30% higher than PSNH's and will raise its rates at about the rate of inflation for the next 8 years so that it can recover its investment in Shoreham. See LILCO's Annual Report for 1990 at 16 and 44.

Thus, PSNH's ratepayers will feel almost no real pain as a result of all the wrongheaded policies that have converged on Seabrook.

The investors, on the other hand, will suffer severe pain - especially the common stockholders.

PSNH's investment in Seabrook as of January 1, 1990 was $2.9 billion. App. C at 92a. Because costs and interest continue to accrue, it was surely well over $3 billion by July 1, 1990. Since Reorganized PSNH will place only $1.5 billion of its investment in Seabrook on the books as of that date or later, and since the unsecured creditors and preferred stockholders will "give up" $462 million (Memorandum Opinion on "RKR" Objections Re Confirmation of Plan of Reorganization 114 B.R. 820 (Bankr. D.N.H. 1990) (App.K at 574a.)), the common stockholders will lose at least $1.038 billion.

The common stockholders will receive at most and only if the Plan is fully implemented $163.5 million, (See Extracts from the Disclosure Statement, App. M at 658a) and thus at most 14 cents on every dollar they have invested in PSNH. However, since their actual distributions depend on the amount of unsecured claims finally allowed, they will receive less than the maximum, and probably closer to 10 cents on the dollar.

Moreover, if the merger does not occur so that PSNH ends up as a stand-alone company, the common stockholders, as well as the other impaired classes, will receive still less.

The Agreement contains an "Equity Collar" that provides that the seven 5.5% rate increases will be adjusted to keep the return on equity of Reorganized PSNH below 13.25% and above 10.5% on a cumulative basis over the seven year period.

If the merger occurs any downward adjustment will be based on $2.3 billion. If, however, the merger does not occur and PSNH ends up as a stand-alone company, the adjustment will be based on an assumed investment of $2 billion. The upward adjustment in either case will be based on an assumed investment of $2 billion. App. C at 204a- 209a.

This Equity Collar reflects the fact that the negotiators for the State refused to allow Reorganized PSNH to charge rates that would enable it to recover more than $2 billion. App. C at 276a. They wanted to wipe out the equity holders. They were, however, willing to permit NU to charge rates based on $2.3 billion, if NU could prove to the PUC that the merger would generate at least $300 million in savings for the ratepayers. NU proved that the merger would generate $516 million of savings

(App.C at 294a) so it will have a chance at recovering its $2.3 billion investment and a return thereon, that is modestly below its cost of capital. App. C at 203a.

Reorganized PSNH, as a stand-alone company, however, will have no chance. It will be limited to earning a return of 13.25% on the assumed equity portion of $2 billion, not its entire equity. As a consequence, its common stock will earn a return far below its cost of capital and be worth substantially less than $20 per share (App. C at 161a and 340a). If that happens, the impaired classes will have received substantially less than the Disclosure Statement estimated they would receive. App. M at 656a-658a.[3]

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[3] Recognizing, but not until January 1991, that the Disclosure Statement was false on this point, RKR asked the Bank-

Thus, even if it can be said that the State has obtained by its deal with NU just compensation for PSNH's property, the State nevertheless has violated the constitution. It in effect has taken PSNH's property for a private purpose - to benefit NU's stockholders and ratepayers as well as PSNH's ratepayers.

But the State clearly has not obtained just compensation for PSNH's property. Even if the Constitution requires only a balancing of ratepayer and investor interest, it surely can not be said that the above described disparity in pain is just.

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ruptcy Court to revoke the Confirmation Order on the grounds of fraud. The Bankruptcy Court denied the request on the grounds that it was barred by the Code (11 U.S.C. § 1144) even though it had not yet gone into effect.

And if, as RKR contends, the Constitution requires that prudent investment be the measure of just compensation, the result is clearly and woefully deficient.

As stated in the Disclosure Statement, an audit done for the PUC concluded that 93% of PSNH's investment in Seabrook was prudent. Another done for the Connecticut Department of Public Utility Control, concluded that 75% was prudent. App. M at 670a. Audits done by PSNH and the joint owners claimed that 100% of the investment was prudent. These audits indicate that the State has in effect confiscated from $750 million to $1.5 billion of PSNH's property as of July 1, 1990, and more as of any later date.

No one has as yet offered these audits into evidence in any proceeding, but no one has as yet offered any other evidence on the subject either. It is conceivable that less than 50% of

Seabrook was prudent but no one has generated any information that would cause one to think so. NU and the State have been able to achieve this grossly unfair result without having to supply any evidence or analysis whatsoever that it was consistent with PSNH's right to recover its prudent investment. And they were able to do it because and only because the State first forced PSNH into bankruptcy with its anti-CWIP law.

Creation of the Plan

On March 16, 1989, the Bankruptcy Court denied PSNH's motion for an extension of the "exclusivity period". It then became possible for NU, among others, to get confirmed a plan of reorganization for PSNH over the objection of PSNH and without the acceptance of its common stockholders.

Also, on April 21, 1989, the Nuclear Regulatory Commission (the "NRC") issued

an operating license to the Long Island Lighting Company ("LILCO") for its Shoreham Nuclear Power Station ("Shoreham") which had experienced identical licensing problems. It was then apparent that the NRC would soon license Seabrook, and that PSNH would soon have the right under New Hampshire law to file for, and receive, a substantial rate increase. RSA 378:27,:28 and :29. Moreover, the law obliged the PUC to grant a substantial temporary within six months to cover prudent investment or a surcharge on the permanent increase to recoup the difference. The State then had a very strong interest in making a deal with somebody that would avoid that outcome.

NU and the State were natural allies and soon combined to try to take PSNH at the lowest possible price, regardless of the State's obligations under the Consti-

tution and the law and regardless of the impact on the investors in PSNH. See the Extracts from the Examiner's Second Report, App. O at 721a-722a.

The Equity Committee initially resisted and it was able to achieve more value for the equity holders than NU originally contemplated paying. But in the end the Equity Committee accepted the Plan and thus far less than what PSNH and its stockholders were entitled to. Why? The answer is clear. They negotiated until they got enough for themselves and the people they truly represented and then caved.

All members of the Equity Committee, except for Petitioner Rochman, are holders of preferred stock. App. M at 650a.[4]

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[4]The record does not reveal the members' actual holdings because the Trustee referred RKR's request for such

Holders of preferred have an inherent conflict of interest with holders of common. Also, unpaid dividends on preferred earn no interest, and therefore the preferred have an interest in making a deal that satisfies them as quickly as possible rather than fighting for more. But here the conflict is even more severe.

The record indicates that the Equity

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information to the Equity Committee and the Equity Committee ignored it. But at a meeting in the Trustee's office on February 28, 1990, to consider the applications of Richards, Kaufman and other common stockholders to be appointed to the Equity Committee, at which counsel for NU and the committee were present, the Trustee stated that all members of the committee held predominately preferred stock.

Committee is dominated by persons who hold PSNH's older relatively low dividend (3.35% to 9%) $100 par value preferred stock. The Chairman of the committee, The Mutual Benefit Life Insurance Company, holds 9.18% of the $100 par value preferred stock. And the Ex Officio member, the Prudential Life Insurance Company of America holds 14.64% of the $100 par preferred. App. M at 684a.

Also, the fact that the Equity Committee chose to base the allocation of the distribution to the preferred on par value rather than on the total pre-petition claims suggests rather strongly that the committee is dominated by such holders. The preferred as a class will receive about 70% of their pre-petition claims but each holder will receive about 104% of par value. App. M at 656a. The holders of the low dividend preferred will receive more and in some cases sub-

stantially more than 70% of their pre-petition claims.

Mr. Harry Saxon, a holder of the highest dividend $25 par value preferred, appeared at the confirmation hearing to complain about the allocation. He argued that it should have been based on total claims rather than par value and claimed that it was based on par value because the committee was "packed" with holders of the $100 par preferred.[5]

Counsel for the committee objected to Mr. Saxon's characterization but he did not refute the allegation. He then said that the allocation was based on par value in order to "get more down to the common." The Bankruptcy Court adopted

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[5] The transcript from the confirmation hearing dealing with Mr. Saxon's allegation and complaint is at Appendix N.

that explanation (see Extracts from the General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues, App.L at 648a), but it is obviously specious. Reallocating the distribution to the preferred can not get more down to the common. What it could do, however, and no doubt did do, was make the "give ups" by the preferred to the common more acceptable to the holders of the $100 par preferred on the committee.

And the holders of such stock of course have a great interest in having the Plan confirmed. They will receive more from the Plan than they could expect to receive if PSNH recovered all of its investment in Seabrook and then honored all its obligations to its creditors and preferred stockholders. They would then receive their unpaid dividends but their stock would once again fall to a rather small percentage of par value.

It is not surprising, therefore, that the Equity Committee decided to accept the Plan rather than hold out for more for the $25 par preferred and the common.

And once NU and the State had obtained the support of the Equity Committee, it was not difficult for them to persuade management of PSNH to climb on board.

Management had indicated, years ago, that it was a lot more concerned about the ratepayers and acceptance by the State of its stewardship than the welfare of the common stockholders.

In 1988, shortly after the filing in Chapter 11, management changed the accounting on Seabrook, effective for 1987, to eliminate the allowance for funds used during construction (AFDUC) and thereby wrote off, for financial statement purposes, about $1 billion. App. K at 563a.

It justified the change by saying that "political and competitive pressures would not permit the Company to recover the recorded cost of its investment in accordance with traditional utility ratemaking practices." App. M at 679a.

The change in accounting did not preclude management from actually trying to recover most if not all of Seabrook in a rate case. It did not make the change on the regulatory books, the Form 1, used for ratemaking purposes. Nevertheless, it said, at the end of the disclosure statement process under pressure from the Bankruptcy Court (App. K at 568a, n.2), that it would not try to recover more of Seabrook than resulted from the accounting change ($1.8 billion). After that statement, management was only a short step from supporting the Plan.

The State and NU apparently did not think PSNH's support was necessary. NU

had already completed preparation of the Disclosure Statement and the legislature had already passed RSA 362-C. But they apparently thought it was prudent to get management's support.

To secure it, NU agreed to retain all of PSNH's employees except for the top five officers and would give those five reasonably generous retirement benefits (App. M at 651a)(referred to by some parties to the proceedings before the Commission as "parachutes"). App. C at 135a. NU agreed as well to give the other 51 key employees significant job security. App. M at 653a.

Once management had accepted such terms, it was no longer a factor in the case. For all intents and purposes, NU and PSNH became one. And on April 30, 1990, pursuant to the Plan and Confirmation Order, PSNH's Board and top five officers resigned. A new board was

selected by the official committees, and NU, in anticipation that the Plan will be fully implemented, began to manage PSNH. If the merger agreement is terminated sometime in the future, NU will continue to manage PSNH for six months until new management can be put in place.

Acceptance by the Impaired Classes

NU also secured acceptance of the Plan by all the impaired classes except the warrant holders by the necessary majorities (67% of those voting).

To achieve it, NU drafted and distributed the Disclosure Statement which described the Plan and the likely consequences (according to NU) if the Plan is not confirmed. It stated, inter alia, that PSNH would then have to seek rate relief in the traditional manner, and that since PSNH did not have a right to recover its prudent investment in Seabrook because the PUC had "a great

deal of discretion" and "wide latitude" to establish rates that were "affordable", PSNH could not be certain of achieving more in a rate case than will be achieved by the Plan. App. M at 661a-678a.

The Examiner, Mr. Paul L.Gioia, a former chairman of the NYPSC, aided NU and the Bankruptcy Court in describing the rate case alternative. The description apparently reflects his understanding of the power of the PUC.

It is noted, however, that Mr. Gioia chaired the NYPSC when it held that LILCO could recover all of its prudent investment in Shoreham and that it would be "imprudent, unfair, and bad regulatory policy" to deny LILCO that right even if some of Shoreham's capacity proves to be excess for some period of time. Re Long Island Lighting Company, 75 P.U.R. 4th 423 at 457 (1986). Mr. Gioia apparently

believes that the PUC has the discretion to be unfair, as well as wrongheaded.

The Disclosure Statement also said that if the equity interests did not accept the Plan, NU would request that it be confirmed anyway. App. M at 659a. And as noted above, the Disclosure Statement did not disclose what the common would receive as a percentage of their total investment and misrepresented what the equity holders would receive (and did not disclose what the unsecured creditors would receive) if the merger were not consummated. And it also gave the distinct impression that there was no one involved in the case that was terribly interested in pursuing the rate case alternative.

Given such a Disclosure Statement, it is not surprising that the impaired classes (other than the warrant holders) accepted the Plan. But even so less than

40% of the common, and less than 40% of the $25 par preferred, actually voted affirmatively to accept the Plan. App. O at 706a. New Hampshire law requires, under normal non-bankruptcy circumstances, that more than 50% of the common stockholders eligible to vote approve a sale of the company. RSA 293-A:74. The State thus managed to avoid another protection provided by New Hampshire law to investors in its utilities.

The Petitioners

RKR began to participate in the process in December of 1989 after the deal had been negotiated and the Disclosure Statement had nearly been finalized.

Mr. Rochman was appointed to the Equity Committee in November of 1989 and immediately announced his opposition to the Plan. He also asked the Trustee to appoint a separate committee to represent the common stockholders as it was clear

to him that the Equity Committee dominated as it was by preferred stockholders could not and had not properly represented the common. His request was denied.

Mr. Richards is a lawyer and worked 17 years for LILCO as a lawyer and corporate planner while LILCO experienced its difficulties with licensing, building and recovering its investment in Shoreham. App. K at 599a. He was introduced to Mr. Rochman in early December, 1989, by Mr. Donald Smith, a major holder of common stock in PSNH (App. M at 684a), and a member of the Equity Committee during the negotiations of the Plan. Mr. Smith told Mr. Richards that he opposed the Plan and resigned shortly after it had been negotiated. Mr.Rochman was apparently selected by the Trustee to replace Mr. Smith on the committee to give the common at least token representation.

Dr. Edward Kaufman is a major stock-

holder in PSNH and responded in January 1990 to the efforts of Rochman and Richards to solicit opposition to the Plan.

Together RKR held about 200,000 shares of common stock on May 16, 1990. The court below noted that that was less than 1% of the stock of PSNH but it is substantially more than held by the former management of PSNH (App. M at 684a) and as far as the record discloses substantially more than held in total by all the other persons actively involved in the case. Also, as RKR informed the Supreme Court of New Hampshire at oral argument, RKR has received financial support from more than 2000 other stockholders that held more than one million additional shares.

Confirmation of the Plan

After making some unavailing motions to change the Disclosure Statement to better reflect PSNH's rights, to create a

common stockholder committee that could effectively represent the common stockholders at the confirmation hearing (In re Public Serv. Co. of N.H, 116 Bankr. 347 (Bankr. D.N.H. 1990) and to summarily reject the Plan (In re Public Serv. Co. of N.H, 112 Bankr. 49 (Bankr. D.N.H. 1990), RKR submitted detailed objections to the Plan.

RKR contended therein that given the prudency audits and the absence of any other information on the subject, NU could not possibly prove, and the Bankruptcy Court could not possibly determine, that the result of the Agreement was within the range of outcomes of a Seabrook rate case.

RKR acknowledged that PSNH could probably not recover its prudent investment in the traditional manner, i.e. on a straight line basis over its useful life, but argued that PSNH could recover it or

at least much more than 50% of it in a non-traditional manner.

They pointed out that consultants to the industry had been saying for years that straight line depreciation of long lived utility investments was irrational and contrary to the public interest because it caused the "revenue requirement" (and therefore rates) to increase greatly when a large investment (even an economic one) first goes on line (the rate shock) and then to decline over the life of the investment, while the value of the services provided by any investment will probably increase with inflation. RKR argued that PSNH should change, and the PUC should permit it to change, to a depreciation method that would ameliorate the rate shock and then cause the revenue requirement to rise rather than fall over Seabrook's life. RKR supplied some analyses that indicated how that could be

done, and that if it were done, PSNH could recover much more than 50%, if not all, of Seabrook with rates that were as low and perhaps lower than the rates analyzed by Bower, Rohr & Associates, as described in the Disclosure Statement (see App. M at 673a) and thus with rates that would not impose an excessive burden on the economy.

RKR argued that although PSNH did not have a constitutional right to recover its prudent investment in the traditional manner, the State also could not insist that PSNH do so in order to justify denying recovery of prudent investment. RKR argued that the PUC must change from tradition if necessary to give PSNH a fair opportunity to recover its prudent investment.

RKR also pointed out that recovering most of Seabrook would be burdensome, mainly because PSNH would have to have a

substantial equity ratio to protect itself from regulatory risk and as a consequence would have to pay substantial taxes to the federal government. The rest of the nation would thus "profit" greatly from New Hampshire's distress. To avoid that, RKR suggested that the State cause its Energy Authority to buy PSNH's securities for a fair price - $3.4 billion or so. Then the State could honor its legal and constitutional obligations to the investors and the Energy Authority could probably recover the purchase price and its other costs with rates that were no higher, and perhaps even lower, than set forth in the Agreement.

NU responded to RKR's objections by arguing that the PUC had "essentially unfettered discretion" to set just and reasonable rates and thus could deny the recovery of prudent investment if neces-

sary to set what it considered to be "affordable rates"; that PSNH could not expect to recover more than $1.8 billion of Seabrook because management had already said that it would not try to recover more; that rates must be set in conformance with GAAP and therefore a change to some other depreciation or amortization method was not possible; and that if PSNH tried to recover its entire investment in the traditional manner, or even pursuant to a so called 10 year phase-in (that was permitted by GAAP), it would lose much of its loads to cogeneration and municipalization. It also said that the State no longer had any interest in buying PSNH. (To prove that, the State repealed the statute creating the Energy Authority during the confirmation process. App. K at 548a.) Or in other words, according to NU, if PSNH charged high rates, individual communi-

ties would be inspired to get off the system, forcing rates up to everyone else, but the State would not be inspired to negotiate a fair price for the whole system in order to reduce rates for all.

NU sponsored a parade of witnesses at the confirmation hearing to support their arguments. They said that PSNH could not expect to recover all of its investment in Seabrook in the traditional manner because the rates would have to be to high (which RKR had of course conceded). And they said that in their opinion the Agreement would produce a result within the range of what could be expected from a Seabrook rate case but none of them said that as little as 50% of Seabrook might be prudent and none of them articulated any other principle, other than "unfettered discretion" that would, if applied, limit recovery to as little 50%. Their claimed expertise was

not in prudent investment or in the application of the "used and useful principle, but rather in predicting what the PUC would do in a rate case, in response to testimony that had not yet been produced and how the courts, including this Court, would react. In other words, they claimed expertise in telling fortunes.

Richards cross examined NU's witnesses and testified himself to rebut NU's criticism's of RKR's objections. The court excluded much of what Richards offered on the grounds that it was not detailed enough because it did not describe what would happen in the next century and (10 minutes later) that it was too detailed because it would get the court involved in conducting a rate case. App. N at 715a- 719a.

Seven days after the close of the hearing, the Bankruptcy Court issued its confirmation order. A month later, on

May 17, 1990, it issued its opinion dealing with RKR's objections. The Bankruptcy Court essentially adopted all of NU's arguments. App. K at 613a to 633a. In particular it said that PSNH did not have the right to recover prudent investment but only prudent investment in used and useful plant and the PUC has the power to "evolve" the used and useful principle as necessary to effectuate a sharing of the prudent cost in excess capacity. It also said that even if PSNH could achieve more in a rate case, intervening interest would consume any additional value, thus subscribing to the notion advanced by NU that the State could, by mere vigor, cause delay and at stockholder expense, despite the fact that RSA 378:29 says that PSNH would be entitled to a temporary that covers prudent costs within 6 months or a surcharge on the permanent rates that recoups the difference.

RKR filed a timely appeal with the District Court of the District of New Hampshire claiming that the opinion was clearly erroneous because it was clearly contrary to PSNH's constitutional rights and irrational. NU showed that PSNH could not recover all of Seabrook in the traditional manner but that hardly implies that the Agreement was a fair compromise unless the PUC has unlimited discretion to set just and reasonable rates. RKR also asked the Bankruptcy Court for a stay which was denied. In re Public Serv. Co. of N.H. 116 Bankr 347 (Bankr. D.N.H. 1990). RKR also asked the District Court for a stay.

The District Court has not yet responded in any manner to RKR's appeal. On June 12, 1991, NU filed a motion to dismiss RKR's appeal. NU claims that since the first step of the Plan has been implemented, RKR's appeal is moot. RKR

disagrees and has objected to the motion.

The PUC Proceeding

As the final hurdle to implementing the Plan, NU and the State had to secure PUC approval of the Agreement. To make that simple, and a sure thing even if PSNH refused to cooperate, the State enacted RSA 362-C.

RSA 362-C authorizes the PUC to approve the Agreement and Plan, or any other plan that was not more costly for the ratepayers, notwithstanding any other provision of law, if the PUC determines that it is consistent with the public good and will resolve the bankruptcy.

On December 22, 1989, the PUC initiated the required proceeding. Until the Confirmation Order was issued, RKR concentrated its limited resources on the confirmation hearing and did not try to get involved in the PUC proceeding.

After the Confirmation Order was

issued, RKR, believing that the PUC could not approve the Agreement without a determination that it was consistent with PSNH's constitutional rights, and could not make that determination because there was no information that would support it, petitioned to intervene so that they could appeal the PUC's approval to the Supreme Court of New Hampshire. The PUC denied their petitions saying they were late and that there was not enough time to consider the constitutional questions.[6]

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[6]The PUC order denying Richards' petition is at App. G. The Equity Committee cited Leach v. FDIC, 860 F.2d 1266, 1274-75 (5th Cir. 1988), cert. denied. 109 S.Ct. 3186 (1989) to say that Richards was like the Ghost of Hamlet's Father, a bodiless soul, improperly trying to influence the temporal world. Thinking that that ghost did have some

RKR petitioned the Supreme Court of New Hampshire for a Writ of Prohibition to stop the PUC proceeding on the grounds that RSA 362-C was unconstitutional, because it authorized the PUC to approve the Agreement notwithstanding any other provision of law and effectively prohibited the PUC from approving any more costly plan. That petition was dismissed without prejudice.

The PUC issued its decision on July

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impact on Hamlet, and that the analogy was otherwise apt, Richards took some liberties with Shakespeare in a request for rehearing. Excerpts from that pleading are at App. H, excerpts from PSNH's gloating response is at App. I, and the PUC's cryptic Report and Order No. 19,830 is at App.J. It is not clear what the PUC thinks is a lot of sound and fury signifying nothing.

20, 1990. NU had supplemented the record after the Confirmation Hearing, and perhaps in response to RKR's efforts to raise the constitutional questions, by incorporating some of the testimony before the Bankruptcy Court. App. C at 170a-173a. And the PUC, in reliance on that testimony and the opinion of the Bankruptcy Court, held that $1.5 billion of Seabrook was within the range of what it was likely to allow PSNH to recover in a rate case. App. C at 179a. RKR filed a request for rehearing (App. D)[7] claiming the following:

1. That the approval resulted in the taking of PSNH's property without just

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[7]Pursuant to RSA 541.3 a person can ask for rehearing and appeal a PUC decision, if he is directly affected by it, even if he was not a party to the proceeding. See App. A at 13a.

compensation because the PUC had not determined based on substantial evidence that the Agreement will enable PSNH to recover its prudent investment in used and useful plant.

2. That even if the Constitution did not entitle PSNH to recover prudent investment in used and useful plant, the State had, nevertheless, provided that right by RSA 378:27 and 28 and by passing and implementing RSA 362-C, the State had deprived PSNH and its investors of a vested right.

3. That by passing and implementing RSA 362-C, the State had deprived PSNH and its investors of equal protection of the laws.

4. That RSA 362-C was also unconstitutional on its face, because it authorized the PUC to approve the Agreement without regard to whether it would enable PSNH to recover its prudent investment

and prohibited the PUC from approving any alternative plan of reorganization that would achieve greater value for PSNH.

The PUC held that RKR had no standing to complain since they were mere stockholders, but also said that RKR was wrong on the merits in all respects anyway. It said in particular that PSNH did not have a constitutional right to having its rates set in accordance with RSA 378:27 and :28, as the Constitution did not require the PUC to apply the traditional method of setting rates (App. E at 473a); that the value of PSNH had been determined by the Confirmation Order and PSNH's election to have the rates approved pursuant to RSA 362-C and therefore RKR was not injured by the PUC order; and the fact that PSNH was in bankruptcy justified treating PSNH differently (and apparently worse) than the other New Hampshire utilities. App. E at 475a.

The Appeal to the Court Below

RKR filed a timely appeal with the Supreme Court of New Hampshire. NU urged the court to dismiss RKR's appeal for lack of standing but it also responded on the merits.

CRR and Hilberg appealed as well. They claimed that the PUC had not properly implemented RSA 362-C, because, inter alia, the language in the statement of purposes required the PUC to determine whether the rates were just and reasonable as defined by N.H. law and therefore to determine whether the rates provided a reasonable return on an appropriate rate base.

The court below dismissed RKR's appeal. App. A. It held that RKR could not bring the appeal in their individual capacities, mindlessly applying the general rule that stockholders have no standing to complain about wrongs done to

their corporation. App. A at 16a. It also held that RKR could not bring the appeal as a derivative action on behalf of the corporation because RKR had not named PSNH as a party to the appeal, ignoring the fact that PSNH had joined with NU in opposing the appeal. App. A at 15a.

The court, however, did grant the CRR and Hilberg standing. It held, relying on decisions from other states, that ratepayers are directly affected by rate decisions. App. A at 19a.

The court then held that the PUC had properly implemented RSA 362-C. It said that the legislature had intended by the "just and reasonable" language in the statement of purposes that the PUC determine that the rates were consistent with the requirements of the Constitution, and not with the requirements of RSA 378:27 and :28. App. A at 42a. It then said that since the Constitution did not re-

quire the PUC to use any particular method of determining the justness and reasonableness of rates, it did not require the PUC to use the traditional methods of RSA 378:27 and :28. It said that it was the impact of the rate order that counts but the PUC need not follow any particular method of determining whether the impact was just and reasonable. App. A at 45a. It then concluded that the PUC had properly implemented RSA 362-C and affirmed the order. App. A at 46a.

Thus, despite the fact that the court below dismissed RKR's appeal, it nevertheless expressed its opinion as to what the Constitution requires with regard to just and reasonable rates. And clearly, according to it, the Constitution does not require anything of substance. According to it, the Constitution gives the PUC, as the State and NU have contended throughout this proceed-

ing, essentially unfettered discretion to set just and reasonable rates. According to it, the Constitution permits the PUC to set rates anyway it pleases provided only that it "determine" after all else is said and done that the impact is "just and reasonable". Or in other words, according to the Court below, the Constitution requires only that the PUC put the right label on the impact of a rate order.

Since the court below did express its opinion on what the Constitution requires with regard to just and reasonable rates, RKR respectfully submits that it is appropriate for this Court, if it determines that RKR has standing to present the question, to now consider whether the State took PSNH's property without due process of law when it approved the Agreement without regard to whether it will enable PSNH to recover its prudent

investment in its used and useful property. There is no point in remanding that question back to the court below so that it can say once again that this Court has held that the Constitution requires nothing but the right label on the impact.

The opinion of the court below makes a mockery of the Constitution and all of this Court's decisions in this area since FPC v. Hope Natural Gas Co, 320 U.S. 591 (1944) ("Hope"). According to it, Hope and its progeny are in effect a lot of sound and fury signifying nothing at all. The time is therefore more than ripe for this Court to say clearly and unambiguously that the Constitution does in fact provide real protection to investments in and by the nation's utilities.

REASONS FOR GRANTING THE WRIT

RKR's submits that the mere recitation of what has happened in this case

warrants granting of the writ. The State promised by statute and PUC decision to investors in PSNH that PSNH would be allowed to recover its prudent investment in Seabrook and then when Seabrook was finished and about to go on line, it made a deal with NU in total disregard of that promise. It then authorized the PUC to approve the deal without regard to the promise and the PUC dutifully complied. And then the State's Supreme Court, in what is perhaps the most shocking action of all, held that RKR, stockholders in PSNH, and members of the class that are most severely injured by the State's breach of promise, can not complain.

Surely, what the institutions of the State of New Hampshire have done to the stockholders of PSNH, and to RKR in particular, falls far short of the due process guaranteed by the Constitution.

RKR Should be Granted Standing

The general rule that stockholders do not have standing to complain as individuals about wrongs done to their corporation should not be applied here. Normally wrongs done to corporations do not injure the stockholders directly. Their impacts can not normally be traced to changes in the value of their stock. But that is not true here.

The very purpose of the Agreement was to determine Reorganized PSNH's current rates and base for future rates and therefore the value of Reorganized PSNH's stock. The State intended that approval of the Agreement would have, and it did have, a direct and immediate impact on stockholder wealth. In form, the State confiscated PSNH's property but in substance it confiscated stockholder wealth.

Moreover, the State wronged, as well

as injured, the stockholders directly. PSNH is obliged by RSA 374:1 to serve the public and will serve, if it can, regardless of how it is treated by the State. Therefore, the purpose of RSA 378:27, :28 and :29 is not to induce PSNH to invest in electric facilities, since PSNH is obliged to invest, but rather to induce investors to invest in PSNH so that PSNH can provide service to the public at a reasonable cost. By passing and implementing RSA 362-C, the State breached the promise made to the investors by RSA 378:27 and 28, and therefore wronged them directly.

The court below said that since the alleged wrong was done to all the stockholders, RKR can not complain. Surely, the State's actions can not escape challenge in the courts by stockholders that are able and willing to complain simply because the State has wronged and injured

directly each and every stockholder.

RKR should also be granted standing, if necessary, to bring this action on behalf of the estate of PSNH. Normally, stockholders in a utility can and will rely on management to protect the value of the utility's assets. To our knowledge, no stockholder of a utility has ever before challenged a rate decision. But PSNH is in Chapter 11 and that fact provides a special reason for RKR to challenge the rate decision and a special justification for allowing RKR to do so.

The Bankruptcy Code gives individual stockholders the right to object to and contest a plan of reorganization even if it has been accepted by the debtor, all the committees and all the impaired classes. The Code recognizes that the people who get involved in bankruptcy proceedings and appointed to official committees are in it to serve and protect

their own interests and neither they nor management can be safely relied on to truly represent all parties in interest. Individual parties in interest are given the right to object in order to provide every assurance that their rights will be protected. And the record in this case provides ample reason to believe that neither management nor the Equity Committee were terribly concerned about the welfare of the common stockholders and ample reason to believe that both were quite willing to accept a deal that satisfied them regardless of the impact on the common stockholders.

The Bankruptcy Court said that in order to approve the Plan it must determine that the Agreement was within the range of outcomes from a rate case, and claims to have done it. But it made the determination without hearing any evidence on prudency and without hearing or

articulating any objective principle that would justify limiting recovery to anywhere near 50% of Seabrook. In the end the Bankruptcy Court made nothing but what it characterized as a "surface determination as to whether the plan compromise is fair and equitable (App.K at 630a).

Clearly, if the Bankruptcy Court has acted properly, a state can very easily exploit the processes of the bankruptcy court to avoid the consequences of its own wrongheaded policies and the mandates of this Court with regard to just and reasonable rates. Clearly, in order to provide at least some assurance that that will not happen, individual common stockholders must be given standing to challenge any order issued by the regulatory agency approving rates embodied in the plan of reorganization.

The court below said that standing

rules are necessary to "protect against improper plaintiffs". App. A at 11a. It did not say what or who has to be protected, but clearly denying RKR standing does not protect anything from anybody except the State's confiscation of PSNH's property.

Prudent Investment Should Be the Measure of the Impact of a Rate Order

NU and the State were able to get the Plan accepted and confirmed by claiming that PSNH was not entitled to recover prudent investment in its facilities. The Court should now take this case and declare that PSNH, and the other regulated utilities in the nation, do in fact have that right and that the State, by setting rates without regard to whether they will enable PSNH to recover its prudent investment in Seabrook, took PSNH's property without due process of

law.

The establishment of such a rule is of great importance. If the utilities are not certain that they will be allowed to recover their prudent investments, they will not run any risks. They will not invest in large facilities of any kind, in order to take advantage of perceived economies of scale, and they will not invest in anything but proven technologies. And they surely will not invest in nuclear power even if the nation should believe that that must be done in order to get off foreign oil.

But RKR are not asking the Court to declare that utilities are entitled to recover prudent investment in their facilities because it is in the national interest. The Constitution does not require that the states act in the national interest. It does, however, require that the states grant its citizens

and citizens of other states due process and RKR are asking that the Court now declare that due process requires the states to give the utilities a reasonable opportunity to recover their prudent investments.

Ever since Hope the states have declared either by statute, like New Hampshire with RSA 378:27 and :28, or by court decision as in New York that their utilities can recover the original cost of their prudent investments. That was the promise and the expectation. To change the rule after the fact with regard to particular investments that turn out to be uneconomic is fundamentally unfair and should be declared by this court to be a taking of property without due process of law.

And RKR are not asking the Court to now reverse its long line of decisions beginning with Hope and ending with

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) to the effect that the Constitution does not require the states to adopt any particular method of setting rates. RKR are not asking that the Court require the states to take into account prudent investment in developing their ratemaking formulae, but only that the Court require the states to take prudent investment into account when measuring the impact of a rate order.

And RKR are not even asking the Court to hold that states be foreclosed from ever adopting some other measure of the impact but only that if a state wants to adopt some other measure with regard to any or all investments, it do so prospectively and not retroactively. (And of course if a state represents before the fact that it will apply some other measure to a particular investment, it must honor that representation as well.)

Such a clear rule would of course put to rest the notion that New Hampshire can now deny PSNH the recovery of prudent investment in Seabrook in order to effect some sort of sharing of the cost of excess capacity. New Hampshire may want to adopt such a rule but fundamental fairness requires and due process should require that New Hampshire do it before the fact.

The Supreme Court of New Hampshire suggested that the PUC can apply such a notion to the prudent cost of Seabrook in Appeal of Conservation Law Foundation of New England, 127 N.H. 606, 647, 507 A.2d 652, 680 (1986), but by then Seabrook was essentially finished. And neither the Supreme Court of New Hampshire nor the PUC has yet articulated how the notion might actually be applied to Seabrook or any other asset. The Bankruptcy Court said that investors in PSNH had been

given ample warning that some such rule might be applied to Seabrook (App. K at 615a, 618a), but surely the mere suggestion of the notion after Seabrook was finished is no warning at all.

Clearly, up until the time Seabrook was finished, PSNH had a right to recover prudent investment in its facilities and this Court should now hold that the State, by approving the Agreement without regard to whether it would enable PSNH to recover its prudent investment in Seabrook, took PSNH's property and the property of investors in PSNH without due process of law.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A. M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Utilities Commission
No. 90-406

APPEAL OF ROBERT C. RICHARDS,
EDWARD KAUFMAN AND MARTIN ROCHMAN

APPEAL OF CAMPAIGN FOR
RATEPAYERS RIGHTS AND JOHN V. HILBERG

(New Hampshire Public Utilities Commission)

April 24, 1991

Robert C. Richards, of New York, New York, by brief and orally, pro se.

Edward Kaufman, of Scarsdale, New York, by brief and orally, pro se.

Martin Rochman, of Palm Beach, Florida, by brief, pro se.

Backus, Meyer & Solomon, of Manchester (Robert A. Backus on the brief and orally), for Campaign for Ratepayers Rights and John Hilberg.

Rath, Young, Pignatelli and Oyer P.A., of Concord, and Day Berry and Howard, of Hartford, Connecticut, for Northeast Utilities Service Company, and Sulloway Hollis and Soden, of Concord, for Public Service Company of New Hampshire (Thomas D. Rath and Martin L. Gross on the brief, and Mr. Rath orally).

John P. Arnold, attorney general (Harold T. Judd, assistant attorney general, on the brief and orally), for the State.

John J. Lahey for Business & Industry Association of New Hampshire, and Michael W. Holmes for Office of Consumer Advocate, by brief, as amici curiae.

PER CURIAM. In these consolidated appeals, the appellants challenge a decision of the New Hampshire Public Utilities Commission (the PUC) approving a rate plan contained in an agreement relating to the reorganization of Public Service Company of New Hampshire (PSNH)

that was negotiated by Northeast Utilities Service Company (NU) and the State. This decision was issued in the PUC's docket DR 89-244 and reported in Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR4th 385 (N.H.P.U.C. 1990). The appellants are as follows: Robert C. Richards, Edward Kaufman, and Martin Rochman, who are PSNH stockholders (hereinafter referred to as "the appealing stockholders"); John Hilberg, who is a PSNH ratepayer; and Campaign for Ratepayers Rights (CRR), which is a ratepayer group. The rate plan provides for average base retail rate increases of 5.5% per year for seven years, beginning January 1, 1990, and is an integral part of the agreement whereby NU would acquire PSNH, the State's largest electric utility, for $2.3 billion. Although the appealing stockholders argue that the average base

retail rate increases are too low, and Hilberg and CRR argue that they are too high, both sets of appellants contend that the PUC improperly approved the rate plan without a finding that the rates would be produced by the rate plan are "just and reasonable" in accordance with traditional ratemaking principles. Fort the reasons that follow, we affirm the PUC's decision and dismiss the appeals.

I. Facts and Procedural History.

This is an unusual case, in that it involves a public utility that has declared bankruptcy. See Darr, Federal-State Comity in Utility Bankruptcies, 27 Am. Bus. L.J. 63, 64 (1989). PSNH filed for bankruptcy under chapter 11 of the federal Bankruptcy Code on January 28, 1988, citing as the reasons therefor: the magnitude of its investment in Seabrook Nuclear Generating Station Unit 1 (Seabrook); the delay in obtaining

licensing approval from the federal Nuclear Regulatory Commission; and its inability to realize any return on its investment until Seabrook went on line, due to the New Hampshire Legislature's enactment of RSA 378:30-a, the so-called "anti-CWIP" law, which prohibits utilities from charging rates that would enable them to recover the cost of "construction work in progress." Re Northeast Utilities, supra at 391-92.

The bankruptcy court authorized the State to intervene in the proceedings, whereupon the State entered into negotiations with PSNH management and NU, among others, regarding the possible level of rates that could be charged by the reorganized company. Re Northeast Utilities, supra at 392. On November 22, 1989, the State and NU signed an agreement which provided for a merger of PSNH with NU, at an acquisition cost of

$2.3 billion, and which included the 5.5% rate plan. Re Northeast Utilities, supra at 392-393.

In a one-day special session held on December 14, 1989, the legislature adopted a statute which authorized the PUC to review and implement the agreement. This legislation, RSA chapter 362-C (Supp. 1990), became effective on December 18, 1989. The legislature stated that the purpose of the statute was to authorize the PUC

> "to determine whether a proposed agreement relating to the reorganization of Public Service Company of New Hampshire and, upon receipt of required regulatory approvals, the acquisition of Public Service Company of New Hampshire by Northeast Utilities, would be consistent with the public good and whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved."

RSA 362-C:1, IV (Supp. 1990) (emphasis

supplied). To effectuate this purpose, RSA 362-C:3 (Supp. 1990) authorized the PUC,

> "after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with the public good. If the commission so finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates . . . in accordance with, and during the time periods set forth in, the agreement."

(Emphasis supplied.)

Pursuant to this statute, the PUC held hearings on the merits between April 9, and May 5, 1990, and hearings on rebuttal and supplemental testimony from May 22 to 25, 1990. Re Northeast Utilities, 114 PUR4th at 395. Hilberg is the only appellant who was a party to the proceedings before the PUC. In the meantime, the bankruptcy court confirmed

NU's reorganization plan on April 20, 1990, id. at 393, subject to the PUC's approval of the rate plan. See 11 U.S.C. § 1129 (a)(6) (1988) (the bankruptcy court's confirmation of a reorganization is subject to the approval of any rate change provided for in the plan by any governmental regulatory commission with jurisdiction over the rates of the debtor).

Appellants Richards, Kaufman, and Rochman moved separately to intervene in the proceedings before the PUC, but their motions were denied as untimely. Re Northeast Utilities, 114 PUR4th at 395 Appellant Richards thereafter filed a petition in this court, on behalf of himself and appellants Kaufman and Rochman, for a writ of prohibition to the PUC. We denied this petition without prejudice on June 18, 1990.. The appealing stockholders are presently

appealing the bankruptcy court's confirmation order in federal district court.

The PUC approved the rate plan in an order issued on July 20, 1990. See id. at 469-70. The order was accompanied by an extensive written decision, in which the PUC explained its analysis of the average base retail rate increases contained in the rate plan and summarized the evidence supporting its findings. It concluded that "the implementation of the Rate Plan as set forth herein is consistent with the public good . . . and will result in just and reasonable rates that equitably balance the interests of ratepayers and investors." Id. at 460.

The PUC reached its decision after comparing the rate of return to the cost of capital under the rate plan. Id. at 405-08. It also compared the rates under the rate plan with rates forecast for

other New England utilities, id. at 411-12, and the rates estimated, insofar as foreseeable, under traditional ratemaking principles, id. at 410-11. The PUC stated that the rates resulting from the use of those provided for by the rate plan, but that it was not required to calculate the precise level of rates under traditional ratemaking principles "to determine whether the Rate Plan serves the public good with just and reasonable rates over the fixed rate period." Id. at 410. Moreover, it asserted that "[d]termination of just and reasonable rates by traditional ratemaking methodology, is precluded by the Rate [Plan's] prescribing the level of retail rates over the seven year fixed rate period." Id. at 408. The PUC nonetheless estimated the rates that would be achieved under traditional ratemaking principles, insofar as

foreseeability permitted. See id. at 410.

The appealing stockholders, and Hilberg and CRR, subsequently filed motions for rehearing. The PUC denied their motions on August 17, 1990, and these appeals followed.

II. Standing and Preservation of the Issues

Before reaching the appellants' arguments, we must first address the contention shard by the State, and NU and PSNH, that the appellants lack standing. For a court to hear a party's complaint, the party must have standing to assert the claim. 59 Am. Jur. 2d Parties § 30 (1987); see also State ex rel. Thomson v. State Bd. of Parole, 115 N.H. 414, 419, 342 A. 2d 634, 637 (1975) (noting that the purpose of the law of standing is to protect against improper plaintiffs). After an administrative agency has denied an individual's motion for rehearing

filed pursuant to RSA 541:3, in order to have standing to appeal the agency's decision to this court, he must demonstrate that his rights "may be directly affected" by the decision, see RSA 541:3 and :6, or in other words, that he has suffered or will suffer an "injury in fact." See New Hampshire Bankers' Ass'n v. Nelson, 113 N.H. 127, 129, 302 A. 2d 810, 811 (1973); see also Blanchard v. Railroad, 86 N.H. 263, 264-66, 167 A. 158, 159-60 (1933) (holding that a party to an administrative proceeding does not have standing to appeal an administrative agency's decision absent a showing of direct injury). Similarly, a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected. 59 Am. Jur. 2d Parties § 33 (1987). Thus, to have standing to appeal the PUC's decision, the appealing

stockholders and Hilberg and CRR, must demonstrate that they have been "directly affected" by it.

In addition, the appellants must show that the issues raised have been properly preserved for appeal. To appeal a decision or order of the PUC, one must first file a motion for rehearing with the PUC stating "fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. A party or any person directly affected by the PUC's decision or order may apply for a rehearing with respect to "any matter determined in the action or proceeding, or covered or included in the order." RSA 541:3 (emphasis supplied). If the motion for rehearing is denied, the party may then appeal by petition to this court. RSA 541:6. Issues not raised in the motion for rehearing may not be

raised on appeal. See RSA 541:4.

A. The Appealing Stockholders

Appellants Richards and Kaufman are holders of PSNH common stock. Appellant Rochman is a beneficial owner of PSNH common stock recorded in his wife's name. Collectively they own 195,000 shares, which is less than one percent of PSNH's outstanding stock. The appealing stockholders assert that the PUC's decision approving the rate plan resulted in a violation of their, and PSNH's. constitutional and statutory rights to recover their "prudent" investment in PSNH plant "used and useful" in the generation of electricity, and that they have been injured, in that the value of their PSNH stock has decreased. They argue that they should be permitted to bring the present appeal in their capacities as individual stockholders or, alternatively, on behalf of PSNH.

Because the appealing stockholders have not named PSNH as a party to their appeal, we do not address the issue of whether they have standing to appeal in a derivative capacity. See Kidd v. Traction Co., 72 N.H. 273, 286-88, 56 A. 465, 469 (1903) (stating that a corporation is a necessary party to a derivative action); 13 W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5997, at 277 (rev. perm. ed. 1984).

In general, a corporation's board of directors, rather than its stockholders, has the authority to bring an action to redress an injury to the corporation. See 13 W. Fletcher, supra § 5963, at 111. Nevertheless, a stockholder's rights may be directly affected, entitling him to sue in his individual capacity, "(1) where there is a special duty, such as a contractual duty, between the wrongdoer

and the shareholder, [or] (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders," 12B W. Fletcher, supra § 5911, at 421, or by the corporation itself, Gaff v.Federal Deposit Ins. Corp., 814 F. 2d 311, 315 (6th Cir. 1987). A diminution in stock value is an injury that does not fall within either of these two categories and, thus, does not give a stockholder standing to sue on his own behalf. See Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1113 (D.R.I. 1990)

The appealing stockholders have not alleged a direct injury as a result of the PUC's decision approving the rate plan. Nor have they alleged a constitutional violation of their rights that is distinguishable from a violation of the rights of PSNH or other PSNH stockholders. Accordingly, we hold that

they have no standing under RSA chapter 541 to prosecute the present appeal, and, therefore, their appeal is dismissed.

B. Appellants Hilberg and CRR

NU and PSNH contend that appellants Hilberg and CRR also lack standing. Specifically, they argue that Hilberg's status as a ratepayer and the ratepayer status of CRR's members is insufficient to confer standing, absent a showing by Hilberg that he, and by CRR, that its ratepayer members, have been directly affected by the PUC's decision. Hilberg and CRR, on behalf of its ratepayer members, allege that the rate increases that will be imposed upon them as result of the PUC's approval of the rate plan constitute an "injury in fact" that gives them standing to bring this appeal. In rejoinder, NU and PSNH, citing Blanchard v. Railroad, 86 N.H. 263, 167 A. 158 (1933), maintain that the injury alleged

by Hilberg and CRR is no different than an injury to the public in general, and that only the Attorney General and the Office of Consumer Advocate are authorized to represent the public in this instance.

No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State. See Blanchard v. Railroad, supra at 264-65, 167 A. at 159. This is simply another way of formulating the "injury in fact" or "direct effect" requirement. Similarly, an association has no standing to challenge an administrative agency's action based upon a "mere 'interest in a problem.'" Sierra Club v. Morton, 405 U.S. 727, 739

(1972). It does, however, have standing to represent its members if they have been injured. Id.

Unlike the plaintiff in Blanchard v. Railroad, in which "[t]he only interest alleged to have been infringed by the order is that of the public," supra at 264, 167 A. at 158, Hilberg alleges that he, and CRR alleges that its ratepayer members, will suffer a direct economic injury. Courts in other jurisdictions have held that ratepayers are directly affected by rate decisions and, thus, have standing to challenge them. See Iowa-Ill. Gas & Elec.v. Iowa S.Com. Com'n, 347 N.W.2d 423, 426-27 (Iowa 1984) (citing cases); see also City of Houston v. Public Utility Com'n, 618 S. W. 2d 428, 431 (Tex. Civ. App. 1981) (stating that cities, as ratepayers, were "aggrieved" by the public utility commission's order, in that the increase

in electric rates imposed upon them an added financial obligation or burden); Tripps Park v. Pa. Public Utility Com'n, 415 A. 2d 967, 970 (Pa. Commw. Ct. 1980) (holding that Tripps Park, an association whose members included utility customers, had standing to appeal a public utility commission rate order). We therefore hold that Hilberg, as a PSNH ratepayer, and CRR, as the representative of its PSNH ratepayer members, have standing to bring this appeal under RSA chapter 541.

NU and PSNH maintain that Hilberg and CRR, even if they have standing to appeal the PUC's decision, have failed to properly preserve their claims for appeal by raising them in a timely manner. In this appeal, Hilberg and CRR argue first that the PUC erred in approving the rate plan, because it failed to employ the proper analysis to determine whether the

average base retail rate increases contained in the rate plan will produce rates that are "just and reasonable"; namely, "traditional ratemaking analysis." Second, they assert that the PUC was required to consider whether the placement of PSNH's Seabrook assets into a separate corporation, as provided for by the agreement, would be in the "public good." Finally, they appear to raise a due process issue in their brief, but this argument is merely a restatement of their first argument that the PUC did not properly analyze the rates under the rate plan in accordance with traditional ratemaking principles. Hilberg and CRR included the first issue, and arguably the third, but not the second, as grounds for their joint motion for rehearing filed with the PUC. NU and PSNH argue that these claims were not properly preserved for appeal, because Hilberg and

CRR did not raise them during the PUC proceedings or offer any evidence during the proceedings to support them.

Since Hilberg and CRR did not include the second issue as one of the grounds for their motion for rehearing, they are precluded from raising it on appeal. See RSA 541:4. Additionally, because they made only passing reference to "due process" in their brief, did not cite any constitutional provisions, and did not address this issue during oral argument, we hold that they have not properly preserved the third issue for appeal. See State v. Isaacson, 129 N.H. 438, 439-40, 529 A. 2d 923, 924 (1987). However, as to the first issue, we reject NU and PSNH's argument that Hilberg and CRR are barred from raising it on appeal because they did not raise it during the PUC proceedings or offer any evidence during the proceedings to

support it. Hilberg and CRR would have been unable to discover the alleged error made by the PUC, i.e., that it used the incorrect analysis to approve the rate plan, prior to the issuance of the PUC's decision. Cf. Appeal of Cheney, 130 N.H. 589, 594, 551 A. 2d 164, 167 (1988) (stating that parties "are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected"). Moreover, this issue is a legal, rather than a factual one, in support of which it was not necessary to introduce additional evidence during the PUC proceedings. Because this issue was discussed by the PUC in its decision and raised in Hilberg and CRR's motion for rehearing, we hold that it is properly raised on appeal.

To summarize, we hold that the appealing stockholders have no standing

to bring the present appeal, and that although Hilberg and CRR have standing, they have failed to preserve for appeal the second and third issues raised in their brief.

The sole remaining issue is whether the PUC erred in approving the rate plan, because it failed to employ traditional ratemaking analysis to determine whether the average base retail rate increases contained in the rate plan will produce rates that are "just and reasonable."

III. Standard of Review

In addressing this issue on appeal, we apply the standard of review set forth in RSA 541:13. A party seeking to set aside a decision of the PUC has the burden of demonstrating that the decision is unlawful, or, by a clear preponderance of the evidence, that it is unjust or unreasonable. Additionally, findings of

fact made by the PUC are presumed to be prima facie lawful and reasonable. RSA 541:13; see Appeal of Cheney, 130 N.H. at 592, 551 A.2d at 166.

IV. The Analysis Required of the PUC

In this case, we are dealing with an issue of the delegation of legislative power. Subject to acknowledged constitutional limitations, considered below, the regulation o futilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. Duquesne Light Co. v. Barasch, 488 U.S. 299, 313 (1989); The Minnesota Rate Cases, 230 U.S. 352, 433 (1913); see LUCC v. Public Serv. Co. of N.H. 119 N.H. 332, 340, 402 A. 2d 626, 631 (1979). For substantially all of such regulation, the legislature has recognized the need for expertise not readily available as part of legislative

resources, and has therefore delegated its power to a standing regulatory commission of the legislature's creation. RSA ch. 363. The delegated power is exercised in the area of ratemaking, RSA ch.378, which is conducted through ongoing supervision of rate schedules filed with the PUC. In the traditional ratemaking proceeding, when the utility files for a change in rates under RSA chapter 378, a course of action, well defined by that chapter, the PUC's regulations and the decisions of this court, is undertaken. In the reorganization of PSNH under the State's agreement with NU, the traditional approach could have been employed, initiated by a PSNH filing for standard and appropriate changes to its existing rates. The rate element of the reorganization could have come to the PUC, in the normal course, under the

existing statutory delegation and with all of the judicial requirements attached. However, the rate element of the reorganization was far from traditional, since it envisioned contractual protections for NU, through a contractual guarantee of rates designed to cover the cost of acquisition required to be paid by NU. The contractual rates were intended to be in effect far beyond the period normally and historically appropriate for this utility.

The legislature, citing special needs and circumstances in the situation, RSA 362-C:1 (Supp. 1990), saw fit to provide in this statute a special delegation to the PUC of power to review this agreement. RSA ch. 362-C (Supp. 1990). Its delegating charge was for the PUC to "determine whether the implementation of the agreement would be consistent with the public good." RSA

362-C:3 (Supp. 1990). It charged that, if such a determination is made, "notwithstanding any other provision of law," the contracted rates shall be established and placed in effect for the contracted period. Id. In exercise of this authority to determine the public good, the legislature authorized the PUC to inquire into "whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved." RSA 362-C:1,IV (Supp. 1990). The parties disagree as to whether in such consideration of the rates stipulated by the agreement, by using the phrase "just and reasonable," the legislature intended the PUC to apply traditional ratemaking principles. Hilberg and CRR assert that the statute's reference to the "just and reasonable" standard, which is also found in existing

"traditional" ratemaking statutes, e.g., RSA 378:7 and :28, indicates that the legislature wanted the PUC to undertake a traditional ratemaking procedure, and judge the rates under the rate plan according to established "just and reasonable" standards, or, in other words, conduct a "traditional ratemaking analysis." By "traditional ratemaking analysis," Hilberg and CRR refer to the ratemaking process described in Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A. 2d 652 (1986).

According to this process, rates are determined using the following formula: R = O +(B x r), where R = required revenue, O = allowed operating expenses, B = rate base and r = rate of return. Id. at 633, 507 A. 2d at 671; Petition of Public Serv. Co. of N.H., 130 N.H.265, 270-71, 539 A. 2d 263, 266 (1988), appeal dismissed, 488 U.S. 1035 (1989). The PUC

first determines the appropriate values of the three variables in the formula: rate base, rate of return, and the utility's allowed operating expenses. Appeal of Conservation Law Foundation, 127 N.H. at 633-40, 507 A. 2d at 671-75. Rate base is defined as " 'the amount of money that the utility has invested in capital assets (like generating plant and transmission lines) that it uses to provide services to its customers.'" Id. at 634, 507 A. 2d at 671 (quoting Glicksman, Allocating the Cost of Construction Excess Capacity: "Who Will Have To Pay For It All/," 33 Kan. L. Rev. 429, 432 (1985). It may only include property that is "used and useful" in the generation of electricity, in which the utility's investment was "prudent" at the time made. Id. at 637-38, 507 A. 2d at 673-74. The rate of return, "a percentage applied to the rate base

expressed as a dollar amount in order to produce 'interest on long-term debt, dividends on preferred stock, and earnings on common stock (including surplus or retained earnings),'" id. at 635, 507 A. 2d at 672 (quoting C. Phillips, Jr., The Regulation of Public Utilities 332 (1985)), should "yield a return comparable 'to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties[.]'" Id. (quoting Bluefield Co. v. Publ. Serv. Comm., 262 U.S. 679, 692 (1923)). Once it has determined the values of the three variables, the PUC then calculates the utility's allowed revenue requirement, from which rates are derived. Id.at 633-40, 507 A. 2d at 671-75.

Hilberg and CRR note, quoting Appeal of Conservation Law Foundation, that "any attempt to judge reasonableness [of rates] apart from [the traditional ratemaking] process would . . . risk . . . unconstitutionality." See id. at 639, 507 A. 2d at 674. NU and PSNH, on the other hand, maintain that to interpret RSA 362-C:3 (Supp. 1990) as requiring the PUC to apply these statutory ratemaking requirements in its analysis of the rate plan would nullify the statute's purpose, because it would then "be impossible to approve the Rate Agreement." The State, and NU and PSNH also argue that traditional ratemaking analysis is not constitutionally required. They contend that even if it were required, the PUC satisfied this requirement by finding that the rate plan would be consistent with traditional ratemaking principles.

We note at the outset that the PUC did estimate, insofar as reasonably foreseeable, what rates would be produce using traditional ratemaking methodology, and that it compared these rates to the rates under the rate plan. See Re Northeast Utilities, 114 PUR4th at 410. Hilberg and CRR apparently claim that this comparison was invalid, because the PUC was required to, but did not, conduct a full-blown ratemaking proceeding, as part of which a determination of the "prudent" and "used and useful" value of Seabrook would be made. We base our discussion on this characterization of their argument.

A. Under RSA 362-C:3

To resolve Hilberg and CRR's argument that RSA 362-C:3 (Supp. 1990) obligated the PUC to apply traditional ratemaking principles in its analysis of the rates under the rate plan,

"principles of statutory interpretation require us to look first at the statutory language itself," Petition of Jane Doe, 132 N.H. 270, 276, 564 A. 2d 433, 438 (1989), for the words used in the statute are the best indication of legislative intent. See Chambers v. Geiger, 133 N.H. 149, 152, 573 A.2d 1356, 1357 (1990). When possible, a statute will be interpreted in a manner consistent with its plain meaning. Petition of Jane Doe, 132 N.H. at 276-77, 564 A.2d at 438. "We also examine a statute in relation to the statutory scheme." State v. Taylor, 132 N.H. 314, 318, 566 A.2d 172, 174 (1989).

The operative section of RSA 362-C, section 3, provides:

> "The commission is authorized . . . to determine whether the implementation of the agreement would be consistent with the public good. If the commission so finds, it shall,

> notwithstanding any other provision of law, establish and place into effect the levels of rates . . . in accordance with, and during the time periods set forth in, the agreement."

(Emphasis supplied.) In making this determination of consistency with the public good, RSA 362-C:3 (Supp. 1990) authorizes the PUC to determine whether the rate plan contained in the agreement will produce rates that are "just and reasonable and should be approved." Since this consideration is specifically mentioned in RSA 362-C:1, IV (Supp. 1990), it is essential to the operative determination of public good. State v. Perra, 127 N.H. 533, 537, 503 A. 2d 814, 816-17 (1985) (stating that statutes shall be interpreted to effectuate the legislature's expressed intent). RSA 362-C:3 (Supp. 1990) does not, however, expressly require the PUC to undertake any particular analysis of the rate plan.

Hilberg and CRR argue that, because the legislature in its declaration of purpose and findings specifically used the phrase "just and reasonable," a term of art found in traditional ratemaking statutes, it intended the PUC to use traditional ratemaking analysis to assess the rates under the rate plan.

It does not follow from the fact that the phrase "just and reasonable" is used in traditional ratemaking statutes that these statutes apply in the present case. In Petition of Public Service Co. of New Hampshire, a case decided subsequent to our decision in Appeal of Conservation Law Foundation, we stated that in the constitutional sense of the phrase,

> "[a] just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and

ratepayer exploitation."

130 N.H. at 274, 539 A.2d at 268. Thus, we have recognized two "just and reasonable" standards: a statutory standard and a broader, constitutional standard. The question that remains is whether the legislature intended the statutory "just and reasonable" standard to apply in addition to the constitutional "just and reasonable" standard.

It is significant that the only place the phrase "just and reasonable" appears in RSA chapter 362-C (Supp. 1990) is in its "Declaration of Purpose and Findings," RSA 362-C:1 (Supp. 1990), and not in RSA 362-C:3 (Supp. 1990), the operative section. That the legislature used the phrase only in the declaration of purpose and findings section is consistent with a determination that it was using the phrase in the broader,

constitutional sense, rather than in the more specific, statutory sense. The legislature's omission of the phrase "just and reasonable" from RSA 362-C:3 (Supp. 1990), entitled "Action by the commission," indicates that the legislature did not intend to require the PUC to undertake traditional ratemaking analysis. Had the legislature intended the PUC to do so, it could easily have made this an express requirement. It is not the function of this court to add provisions to the statute that the legislature did not see fit to include. Sigel v. Boston & Maine R.R., 107 N.H.8, 23, 216 A.2d 794, 805 (1966). Furthermore, the legislature's mandate that, having determined public good, the contracted rates are to be implemented as agreed, "notwithstanding any other provision of law," calls more for contract review and ratification than for

creative ratemaking.

Interpreting RSA 362-C:3 (Supp. 1990) so as to require the PUC to use traditional ratemaking analysis would also directly contravene the express intent of the legislature in enacting RSA chapter 362-C (Supp. 1990). Cf. Quality Carpets, Inc. v. Carter 133 N.H. ___, ___, ___ A.2d___, ___(decided March 8, 1991) (stating that "[w]e will construe statutes 'so as to effectuate their evident purpose'" (quoting State v. Sweeney, 90 N.H.127, 128, 5 A.2d 41, 41 (1939))). The legislature stated the following as reasons for its enactment of RSA chapter 362-C(Supp. 1990):

> "I. The health, safety and welfare of the people of the state of New Hampshire and orderly growth of the state's economy require that there be a sound system for the furnishing of electric service.
>
> II. The bankruptcy of the state's largest electric utility, Public Service Company of New Hampshire,

> has threatened the adequacy, reliability and cost of electric service.
>
> III. The present and predicted growth in electric service demands in the state of New Hampshire requires a prompt resolution of the bankruptcy and reorganization of Public Service Company of New Hampshire."

The predominant purpose of RSA chapter 362-C (Supp. 1990) was to expedite the resolution of the PSNH bankruptcy by authorizing the PUC, upon a finding of public good, to approve and implement the agreement, which would resolve the PSNH bankruptcy by providing for a reorganization of the utility.

An effort at traditional ratemaking would involve a complex process which, as we noted above, consists of a number of steps. See Appeal of Conservation Law Foundation, 127 N.H. at 633-40, 507 A.2d at 671-75. If RSA 362-C:3 (Supp. 1990) were interpreted as Hilberg and CRR suggest, the PUC essentially would be

required to hold a ratemaking proceeding which could take as long as one or two years. See C. Phillips, Jr., The Regulation of Public Utilities 732 (1985) (stating that "'[f]rom start to finish, the proceedings averaged more than . . . 21 months for ratemaking.'" (quoting a Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation 7 (1977))). As a consequence of this interpretation of RSA 362-C:3 (Supp. 1990), the resolution of the PSNH bankruptcy would be delayed rather than expedited, a result that was clearly not intended by legislature. Further, the agreement was not an appropriate subject for traditional ratemaking. Its contractual nature, its stipulated rate base and its extended term would have made traditional ratemaking a sham or exercise in futility.

Based upon the foregoing analysis,

we hold that RSA 362-C:3 (Supp. 1990) did not require the PUC to analyze the rate plan in accordance with traditional ratemaking principles. By using the phrase "just and reasonable," the legislature referred to the constitutional "just and reasonable" standard, rather than the "just and reasonable" standard found in traditional ratemaking statutes, applicable to traditional ratemaking procedures, and discussed in Appeal of Conservation Law Foundation.

B. Under Constitutional Law

Hilberg and CRR also appear to argue that the PUC was constitutionally required to apply traditional ratemaking analysis. Again, they cite Appeal of Conservation Law Foundation as authority. In Appeal of Conservation Law Foundation, we noted that "any attempt to judge reasonableness [of rates] apart

from [the traditional ratemaking] process would . . . risk . . . unconstitutionality." 127 N.H. at 639, 507 A.2d at 674. We did not, however, foreclose the possibility that there existed other constitutionally permissible means of determining "just and reasonable" rates, nor should our holding in that case be construed as unconditionally requiring the use of that traditional ratemaking methodology.

A holding that the use of that traditional ratemaking formula is constitutionally required would be contrary to well-established federal constitutional case law. In Federal Power Commission v.Hope Natural Gas Co., 320 U.S.591 (1944), the seminal case in this area, the United States Supreme Court held that the Federal Natural Gas Act, 15 U.S.C. @717 (1988), does not require the use of any particular formula

in determining rates. Id. at 602. The Court stated that the methodology used to set rates is irrelevant. See id. Instead, it is the result reached that is important: "[i]f the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry . . . is at an end." Id. Although the Court decided the case under the Federal Natural Gas Act, it noted that "there are no constitutional requirements more exacting than the standards of the Act." Id. at 607.

The holding in Hope has been followed in numerous subsequent Supreme Court cases. In Wisconsin v. Federal Power Commission, 373 U.S.294 (1963), the Court stated:

> "[T]o declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping with this Court's consistent and clearly

> articulated approach to the question of the [Federal Power] Commission's power to regulate rates. It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates."

Id. at 309 (emphasis supplied). Most recently, in Duquesne Light Co.v. Barasch, 488 U.S. 299 (1989), the Court reaffirmed the principle that "'[i]t is not the theory, but the impact of the rate order which counts.'" Id. at 314 (quoting Hope, 320 U.S. at 602); see also Petition of Public Serv. Co. of N.H., 130 N.H. at 275, 539 A.2d at 268 (stating that the Federal Constitution is concerned with only the end result of a rate order). Accordingly, the PUC was not constitutionally required to apply traditional ratemaking principles in its analysis of the rates under the rate plan.

V. Conclusion

In conclusion, we hold that RSA 362-C:3 (Supp. 1990) did not obligate the PUC to analyze the rate plan in accordance with traditional ratemaking principles, nor would such methodology be practical or consistent with the legislative delegation. Further, we hold that traditional ratemaking analysis was not constitutionally required in this case. Since Hilberg and CRR neither argue nor demonstrate that the total effect of the rate plan is unjust or unreasonable, we hold that they have failed to sustain their burden of proof to show that the PUC's decision approving the rate plan was unlawful or unreasonable. Therefore, the PUC's decision must be affirmed. See Appeal of Cheney, 130 N.H. at 592, 551 A.2d at 166.

Affirmed; appeals dismissed.

BROCK, C.J., and BATCHELDER, J., dissented.

BROCK, C.J., and BATCHELDER, J.,dissenting: In this appeal we are asked to determine the legislative intent behind RSA 362-C:3 (Supp. 1990), specifically, whether the legislature intended to require the PUC to analyze the rates under the rate plan negotiated by NU and the State in accordance with existing statutory ratemaking standards. Our decision today will affect electric ratepayers all over New Hampshire for the period remaining under the rate plan and perhaps longer. For the reasons hereinafter set forth, we believe that the majority has incorrectly interpreted RSA 362-C:3 (Supp. 1990) to reach a result that was not intended by the legislature, and, in addition, that they have misapprehended federal constitutional ratemaking requirements discussed both in federal cases and in the decisions of this court.

1. The Statutory "Just and Reasonable" Standard is Presumed to Apply

Reading RSA 362-C:3 (Supp. 1990) to effectuate one of the legislature's express purposes in enacting RSA chapter 362-C (Supp. 1990), see 2A N. Singer, Sutherland Statutory Construction § 58.06, at 723 (Sands 4th ed. 1984), it is clear that the PUC was required to determine whether the rates under the rate plan are "just and reasonable." Although not defined in RSA chapter 362-C (Supp. 1990), "just and reasonable" is a term of art used in RSA 378:7. RSA 378:7, entitled "Fixing of Rates by Commission." requires the PUC to set "just and reasonable" rates, or rates that are "sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation." See RSA 378:27

and :28. According to well-established canons of statutory construction, its is assumed not only that the legislature was aware of this statutory "just and reasonable" standard, see Wyatt v. Board of Equalization, 74 N.H. 552, 557, 70 A. 387, 390 (1908) (stating that a statute "must be read in the light of the circumstances then existing," including "the law as it was then declared"), but that, by using the term "just and reasonable" when it enacted RSA chapter 362-C (Supp. 1990), the legislature intended this standard to apply.

> "'It is assumed that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter . . .
>
> . . . .
>
> Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense.'"

Appeal of Town of Hampton Falls, 126 N.H.805, 809-10, 498 A.2d 304, 307 (1985) (emphasis added) (quoting 2A N. Singer, Sutherland Statutory Constuction § 51.02, at 453-54 (Sands 4th ed. 1984) (footnotes omitted)).

This court further defined the term "just and reasonable" in Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A.2d 652 (1986). In that case, we stated that, given the above-cited statutes, the term "reasonable" or "just and reasonable" rate

> "must be understood as referring to the result of the ratemaking process. The ratemaking process fixes rates that will satisfy a utility's revenue requirement. Reduced to its essentials, this revenue requirement may be expressed as a formula: R = O + (B x r), where R is the utility's allowed revenue requirement; O is its allowed operating expense; B is its rate base, defined as cost less depreciation of the utility's property that is used and useful in the public service, see RSA 378:27; and r is the rate of return allowed on the rate

base."

Id. at 633-34, 507 A. 2d at 671 (emphasis added). The court went on to discuss at some length "both the standard of reasonable rates and the commission's responsibility in light of that standard." Id. at 633, 507 A.2d at 671.

There is nothing in either the language or the legislative history of RSA chapter 362-C (Supp. 1990) to rebut the presumption that the legislature intended the phrase "just and reasonable" to refer to the statutory "just and reasonable" standard. The legislature's use of the phrase "notwithstanding any other provision of law" does not, contrary to what NU and PSNH argue, indicate that it did not intend the statutory "just and reasonable" standard to apply, because this language neither limits nor

describes the analysis the PUC was required to undertake in order to assess the reasonableness of the rates under the rate plan. Nor does the fact tat the phrase "just and reasonable" appears only in RSA 362-C:1 (Supp. 1990), entitled "Declaration of Purpose and Findings," mean that the legislature was using it in its broader, constitutional sense. It is only logical that this phrase, provided that it is used in the same context, has the same meaning regardless of its location in the statutory scheme. Additionally, the legislative history of RSA chapter 362-C (Supp. 1990) provides no indication that the legislature intended any standard other than the statutory "just and reasonable" standard to apply. Therefore, RSA 362-C:3 (Supp. 1990) required the PUC to determine whether the rates under the rate plan met the

statutory "just and reasonable" standard discussed in Appeal of Conservation Law Foundation.

Such an interpretation of the statute does not, as the majority suggests, contravene the legislature's apparent intent to expedite the resolution of the PSNH bankruptcy. The assumption underlying the majority's decision is that the legislature wanted to expedite the resolution of the PSNH bankruptcy by ensuring that the PUC would be able to approve and implement the agreement, including the rate plan, as quickly as possible. A close look at the plain language of RSA chapter 362-C (Supp. 1990) and its legislative history, however, reveal this assumption to be unfounded.

When it enacted RSA chapter 362-C (supp. 1990), the legislature stated that the PUC "should be authorized to

determine . . . whether the rates for electric service to be established [under the rate plan contained in the agreement] . . . should be approved." RSA 362-C:1, IV (Supp. 1990) (emphasis added). The legislature clearly did not intend the PUC to rubberstamp the rate plan. If the legislature had wanted the rate plan to be approved, it simply could have enacted legislation approving the rate plan. It is well-established that the legislature has the authority to set utility rates. See Duquesne Light Co. v. Barasch 488 U.S. 299, 313 (1989); The Minnesota Rate Cases, 230 U.S. 352, 433 (1913) (stating that "[t]he rate-making power is a legislative power and necessarily implies a range of legislative discretion"). Thus, there was no reason for the legislature to delegate this authority to the PUC, unless it wanted the PUC to use its expertise to analyze the rate plan.

The PUC has expertise in determining whether rates are "just and reasonable," which it has obtained as a result of holding numerous ratemaking proceedings in accordance with the applicable ratemaking statutes. By delegating the authority to approve the rate plan to the PUC without any further instructions, it follows that the legislature intended the PUC to conduct its customary analysis of the rates under the rate plan, whereby it would determine whether the rates met the statutory "just and reasonable" standard. This reading of the statute is consistent with the legislative history of RSA chapter 362-C (Supp. 1990): "[t]his bill authorizes the PUC to conduct a full and complete review of the rate agreement . . . . In other words, it delegates to the PUC the authority to perform an expert review of the technical terms of the Agreement." N.H.H.R. Jour. 8

(Special Session, December 14, 1989) (emphasis added).

The legislature desired a prompt resolution of the PSNH bankruptcy, but it desired more. It also wanted to ensure that the rate plan would not unduly burden its ratepayer constituents. A prompt resolution of the PSNH bankruptcy and a careful review of the rate plan in accordance with traditional ratemaking principles were not, however, mutually exclusive goals. Moreover, the enormity of the undertaking involved in this case, namely, the decision whether or not to implement a rate plan calling for seven years of rate increases, warranted a conservative approach in determining the fairness of the rate plan, rather than the conclusory treatment engaged in by the PUC. The legislature had sound reason to expect the former; otherwise, it could have adopted the rate plan by

statute and shunted the PUC from any participation in this process.

II. The Reasonableness of Rates Must Be Assessed in the Context of the Ratemaking Process

Principles of federal constitutional law also required the PUC to assess the reasonableness of the rates under the rate plan in the context of the ratemaking process. The establishment of "just and reasonable" rates involves a balancing of investor and ratepayer interests, Power Comm'n v. Hope Gas Co., 320 U.S. 591, 603 (1944) which occurs when rates are determined in accordance with the traditional ratemaking principles, see Appeal of Conservation Law Foundation, 127 N.H. at 633, 507 A.2d at 671 (stating that the traditional ratemaking process "appropriately balances the competing interests of ratepayers who desire the lowest possible

rates and investors who desire rates that are higher"). By determining a proper rate base value and by allowing a reasonable rate of return on that rate base, the PUC ensures that ratepayers do not pay excessive rates and, in addition, guarantees investors an adequate return on their investment. "[W]hether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular ratesetting system, and on the amount of capital upon which the investors are entitled to earn that return." Duquesne, 488 U.S. at 310.

Although the United States Supreme Court has often stated that there is no constitutionally required ratemaking methodology or formula, Duquesne, 488 U.S. at 316; Colorado Interstate Co. v. Comm'n, 324 U.S. 581, 6045 (1945); Hope,

320 U.S. at 602, it must be remembered that in these cases the applicability of the traditional ratemaking process itself was not at issue, but rather some specific aspect of the ratemaking process, for example, rate base. See Duquesne, 488 U.S. at 301-02; Colorado Interstate Co. v. Comm'n 324 U.S. at 604-05; Hope, 320 U.S. at 603; see also Wisconsin v. Fed. Power Comm'n, 373 U.S. 294, 308-10 (1963) (holding that establishing rates on an area-wide, as opposed to an individual company basis is not unconstitutional); Power Comm'n v. Pipeline Co., 315 U.s. 575 (1942) (upholding the Federal Power Commission's findings as to rate base, amortization period, amortization interest rate, and rate of return). By stating that there is no single ratemaking formula, the Court apparently meant that there was no required formula for determining any of

the three variables used in the traditional ratemaking process, such as rate base. Accord Appeal of Conservation Law Foundation, 127 N.H. at 637, 507 A.2d at 673 (citing cases). Its holdings should not be read as broadly as the majority suggests, to stand for the proposition that rates may be found to be "just and reasonable," in the constitutional sense of the phrase, without reference to the traditional ratemaking process. In this instance, "traditional ratemaking process" refers to the general ratemaking process, whereby rates are determined in relation to the proper rate base and rate of return. This process may be expressed as the following formula: R + O + (B x r); but use of this specific formula is not necessarily required. See id. at 633, 507 A.2d at 671. What is required is that, in determining whether rates are

"just and reasonable," a utilities commission consider the proper rate base and rate of return, which in this case the PUC failed to do.

In Appeal of Conservation Law Foundation, this court noted that any attempt to determine the reasonableness of rates apart from the general ratemaking process described in that case would entail the risk of unconstitutionality. 127 N. H. at 639, 507 A.2d at 675.

> "This is so, not because the State or Federal Constitution guarantees a particular rate, but because existing concepts of the constitutional limits of ratemaking have been developed in the context of a process that does not determine how far to recognize one competing interest in isolation from the other. That process has been described metaphorically as a "constitutional calculus" in which the interests of investors, like the interests of customers, are variables. Consequently, any criterion of reasonableness that might be applied independently from the balancing process that

> does reflect such interests would run the risk of unconstitutionality by inviting the fixing of rates without regard to the balancing of interests."

Id. (citations omitted). Similarly, in Company v. State, 95 N.H. 353, 64 A.2d 9 (1949), we stated that

> "in the Hope case, as in subsequent decisions called to our attention, the findings of the regulatory body whose orders were sustained disclosed a rational process by which a rate base and a rate of return were determined and applied, to produce the return translated into rates, or in default thereof, the case was remanded for further findings."

Id. at 357, 64 A.2d at 14. Reading the above-cited cases in a consistent manner, they teach us that, although there is no constitutionally required formula for determining rate base, or the other variables used in traditional ratemaking methodology, rates cannot pass constitutional muster unless they have been determined in relation to the proper

rate base and rate of return, or in other words, in accordance with the traditional ratemaking process.

III. The PUC's Analysis of the Rate Plan

In the present case, the comparison made by the PUC between the rates under the rate plan and the estimated traditional ratemaking methodology. Instead of determining the applicable rate base by calculating the value of PSNH's prudent investment in property used and useful in the generation of electricity, the PUC assumed the applicable rate base to be $2.3 billion, NU's acquisition cost of PSNH contained in the agreement. Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR4th 385, 410 (N.H.P.U.C. 1990). It did so in spite of its previous decision in Re Public Service Co. of New Hampshire, 66 PUR4th 349 (N.H.P.U.C. 1985), in which it stated

that

> "[r]easonable rates on a just and reasonable rate base cannot be finally prescribed without a prudency determination of the capital investment in rate base.
>
> . . . .
>
> We cannot prejudge the reasonableness of rates or make a definitive finding that rates resulting from the capital investment in Seabrook are unduly burdensome without first finding the prudent investment to which they relate . . . . We are bound by the New Hampshire and federal Constitutions to assure that ultimately PSNH will receive just compensation through rates on prudent investment. While there are constitutional guarantees of the opportunity to earn a fair return, rates may not be 'prohibitive, exorbitant, or unduly burdensome to the public.' The essential reconciliation of prudent investment and reasonable, not unduly burdensome rates may be accomplished in a rate proceeding when PSNH seeks rate support for the addition of Seabrook to its rate base. A prudency investigation should be initiated by the commission on a timely basis to assure an in-depth analysis of prudent investment and the reasonable rate level for a fair return to investors without unduly burdening ratepayers."

Id. at 424 (emphasis added) (citations omitted) (quoting S.W.Tel. Co.v. Publ. Serv. Comm., 262 U.S. 276, 290 n.2 (1923) (Brandeis, J.,dissenting)).

The PUC arrived at this $2.3 billion figure by finding the value of Seabrook to be $700 million and the value of PSNH's non-Seabrook assets to be $800 million. The remaining $800 million was labeled as an "acquisition premium." It does not appear, however, that the $800 million "acquisition premium" represents the value of any particular utility property, so as to be properly included in rate base. See Re Northeast Utilities, 114 PUR4th at 467-68 (the PUC's rulings on Hydro Intervenors' requested findings numbers 3 and 7). The $800 million acquisition premium does not legitimately bridge the gap between the value of PSNH's assets and the price to be paid for PSNH by NU, and is of

little solace to a ratepayer who is forced to contribute to a return on that asset which presumably does not generate electricity but merely helps to indemnify junk bondholders. See Appeal of Conservation Law Foundation, 127 N.H. at 650-51, 507 A.2d at 682-83 (King, C.J>, and Batchelder,J., dissenting).

Since the PUC did not calculate the applicable rate base value,it was unable to properly determine the rates likely under traditional ratemaking methodology and compare them to the rates that will be produced by the rate plan. Therefore, the PUC erred in approving the rate plan, because it did not properly determine whether the rates that would be established by the rate plan are "just and reasonable."

IV. Conclusion

In this case, the legislature contemplated, and ratepayers and

investors alike were entitled to, a careful and thorough review of the rate plan by the PUC in accordance with traditional ratemaking principles. Yet the PUC, instead of determining whether the rates that New Hampshire ratepayers will be charged under the rate plan are "just and reasonable," focused its inquiry upon whether the "rate plan yields the minimum rates necessary to finance the payment of the $2.3 billion bankruptcy compromise to PSNH creditors and equity holders without unduly burdening ratepayers or the N.H. economy." Re Northeast Utilities, 114 PUR4th at 405. Although the PUC cited Appeal of Conservation Law Foundation in its decision, apparently it did not fully comprehend the requirements this case imposes. As a result of its cursory analysis of the rate plan, ratepayers may now be unjustly locked into a rate plan

which not only provides for seven consecutive years of rate increases totaling, on a cumulative basis, approximately forty-five percent, Re Northeast Utilities, 114 PUR4th at 410, but which contains a return on equity "collar" and "ceiling" which allow for further increases, id. at 418.

The PUC, which five short years ago refused to consider the potential effect of a PSNH bankruptcy, see Appeal of Conservation Law Foundation, 127 N.H. at 670, 507 A. 2d at 695-96 (King, C.J., and Batchelder, J., dissenting), in authorizing the further borrowing of hundreds of millions of dollars for the completion of Seabrook Unit I at its then projected completion cost of $4.7 billion dollars, id. at 648-49, 507 A.2d at 681, has once again fallen short of the mark which the New Hampshire Legislature and ratepayers should

reasonably expect of its in the performance of its high constitutional duty. It has found a schedule of rate increases to be in the public good without determining in the first instance whether they are "just and reasonable" as that term has been used by this court, the United States Supreme Court, the New Hampshire Legislature, and its own decisions.

The decision of the court today jeopardizes New Hampshire ratepayers' interest in receiving adequate utility service at a fair cost, because it results in the establishment of a schedule of electric rates that must be borne by ratepayers over a period of years without an oft-promised prudency hearing concerning PSNH's investment in Seabrook, see Re Public Service Co. of New Hampshire, 66 PUR4th at 424, which now exceeds $6.5 billion, Re Northeast

Utilities, 114 PUR4th at 392 (as of January 1, 1990, the total cost of Seabrook, including all direct costs and interest charges, was approximately $6.5 billion). For the reasons set forth herein, we would remand this matter to the PUC for its appropriate inquiry, and accordingly, we respectfully dissent from today's per curiam opinion of the court.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 90-406, Appeal of Robert C. Richards, Edward Kaufman & a. the court upon June 5, 1991 made the following order:

Motions for rehearing filed by Richards, Kaufman and Rochman and by Campaign for Ratepayers Rights and Hilberg are denied. Brock, C.J. . and Batchelder, J. . would grant the motion of Campaign for Ratepayers Rights and Hilberg.

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